IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROSEWOOD SERVICES, INC. and TAMMY HAMMOND,

Plaintiffs,

v. **Case No. 02-2140-JWL**

SUNFLOWER DIVERSIFIED SERVICES, INC. d/b/a CENTRAL KANSAS DEVELOPMENTAL DISABILITIES ORGANIZATION and JAMES JOHNSON,

Defendants.

MEMORANDUM AND ORDER

Plaintiffs Tammy Hammond and Rosewood Services, Inc. ("Rosewood") brought this action pursuant to 42 U.S.C. § 1983 alleging that defendants Sunflower Diversified Services, Inc. d/b/a Central Kansas Developmental Disabilities Organization ("Sunflower") and James Johnson violated their constitutional right to equal protection of the laws and retaliated against plaintiffs for exercising their First Amendment rights. The matter is presently before the court on defendants' motion for summary judgment (Doc. 82) and plaintiffs' motion to exclude portion of expert testimony (Doc. 83).

As explained below, defendants' motion for summary judgment is granted in part and denied in part. Specifically, defendants' motion is granted with respect to all of Ms. Hammond's claims because Ms. Hammond lacks standing to pursue those claims. The court

further grants summary judgment on Rosewood's claims that accrued before the applicable limitations period. Defendants' motion is otherwise denied.

The court will grant plaintiffs' motion to exclude portion of expert testimony because the parties' briefs reveal that this motion is, as a practical matter, unopposed.

STATEMENT OF MATERIAL FACTS[1]

Sunflower is designated pursuant to K.S.A. §§ 19-4001 to -4016 as a community mental retardation facility by the county commissions of Barton, Rice, Pawnee, Rush, and Stafford counties in Kansas. As such, it provides a wide variety of statutorily specified services to persons with developmental disabilities residing in those counties. Among numerous other things, as a community mental retardation facility, Sunflower may establish consulting and/or referral services in conjunction with related community health, education, and welfare services. It is undisputed that, under Kansas law, the county governments could provide these services themselves if they chose not to contract with a community mental retardation facility such as Sunflower. Most of the members of Sunflower's board of directors are appointed by the county commissions of those five counties.

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[1] Consistent with the well established standard for evaluating a motion for summary judgment, the following facts are uncontroverted or, if disputed, are viewed in a light most favorable to plaintiffs, the non-moving parties. *See, e.g.*, *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (setting forth summary judgment standards).

Defendants object to portions of paragraphs 154, 162, 163, 165, 185, 187, and 188 of plaintiffs' additional statement of material facts on the basis that they contain inadmissible hearsay. The court finds that all of these alleged hearsay statements are immaterial to the court's resolution of the issues currently before the court and, therefore, has disregarded them.

In 1995, the Kansas legislature enacted the Developmental Disabilities Reform Act, now codified at K.S.A. §§ 39-1801 to -1811(commonly known as "the DD Reform Act"). When the DD Reform Act was enacted, it provided that any community mental retardation facility (*i.e.*, Sunflower) would become the new community developmental disability organization ("CDDO") for its existing service area and, by virtue of its designation as a CDDO, would be imbued with certain statutory authorities and responsibilities. Thus, Sunflower became the CDDO for Barton, Rice, Pawnee, Rush and Stafford counties. CDDO designations and defined services areas can be changed only with the express approval of the State Department of Social and Rehabilitation Services ("SRS") and only after following various procedures outlined in K.A.R. 30-64-11 to -13.

The DD Reform Act requires SRS to disburse funds to CDDOs such as Sunflower that are appropriate for "the coordination and provision of community services." CDDOs are then responsible for determining whether applicants for services in their defined service areas are developmentally disabled as defined by state law, and whether those applicants meet the financial requirements for receiving government-funded services.

Under the DD Reform Act, Sunflower also serves as the "single point of application or referral" for any developmentally disabled person in Sunflower's five-county service area who wants services under the state's home and community-based waiver program. In Sunflower's referral function, it provides information to eligible persons regarding the services and providers available in the community.

CDDOs also have management, oversight, and quality assurance responsibilities for the Medicaid home and community-based waiver programs developed by the State of Kansas under federal social security laws. Administrative rules and regulations adopted by SRS mandate that Sunflower comply with the provisions of K.A.R. 30-64-01 to -34. Among other things, these regulations require Sunflower to adopt policies and procedures for the delivery of services to developmentally disabled persons in Sunflower's service area, subject to approval by SRS.

Statewide, approximately $8.4 million is paid to CDDOs annually to administer the Kansas developmental disabilities system. Of that total, $2.2 million comes from state general fund revenue, $2.7 million from county mill levies, and $3.5 million from federal Medicaid administrative funding. In 2000, Sunflower received $335,150 as discretionary income in county mill levy proceeds, $145,530 as discretionary income in state aid payments, and $170,764 in state funds for CDDO administration plus the ability to "match" those dollars for 40% in additional federal funds. Sunflower receives its income almost exclusively from public funds and does not pay taxes.

The DD Reform Act provides that CDDOs such as Sunflower are to contract (except under limited circumstances) with entities from which a developmentally disabled person chooses to receive services. K.S.A. § 39-1806(c)(5); K.A.R. 30-64-21. These individuals or entities are commonly referred to as "affiliates" because they must have an affiliation agreement with a CDDO (or be a CDDO) in order to operate. K.S.A. § 39-1803(b). They are also commonly referred to as "community service providers." K.S.A. § 39-1803(e). The affiliates, *i.e.*, service providers, in Sunflower's five-county area include Sunflower itself,

Pathways Res-Care ("Pathways"), plaintiff Rosewood Services, Inc. ("Rosewood"), and, during most of the time period relevant to this lawsuit, included an entity referred to as LJW. Sunflower is the only one of these service providers that serves the dual role of being both a service provider and a CDDO.

Mr. Johnson is Sunflower's executive director and has been since 1980. As such, he is responsible for carrying out Sunflower's CDDO responsibilities associated with the DD Reform Act and state regulations. He also manages the day-to-day operations of Sunflower's provider activities.

In March of 1996, Ms. Hammond went to work for Sunflower as a case manager. In mid-1996 and early 1997, Sunflower was threatened with the loss of its provider license because of disputes that arose between Sunflower and SRS regarding the quality of Sunflower's programs. In late 1997 and early 1998, parents and guardians of Sunflower consumers approached Ms. Hammond and encouraged her to open her own provider agency. In early 1998, she advised Mr. Johnson that she intended to pursue starting her own provider agency. Mr. Johnson told Ms. Hammond that he could "throw a wrench" into her plans if he wanted to. Ms. Hammond borrowed money and received an economic development grant to start up her own competing service provider business, Rosewood. Ms. Hammond is the principal, sole

shareholder, and executive officer of Rosewood, which is a for-profit corporation[2] that provides community-based services to persons with developmental disabilities.

On April 21, 1998, the Sunflower board of directors, in Sunflower's role as a CDDO, adopted a new transition planning policy. Under the new policy, for each client who wished to change service providers, the case manager was required to fill out a form, answer a list of questions, and submit it to Sunflower. The policy required the forms to be completed in order for the transition to be effective. The forms were reviewed twice per month pursuant to a set schedule that effectively provided an approximately one-month delay in allowing consumers to change providers. The policy also required Sunflower to approve the transfer after interviewing the consumer and guardian. It is uncontroverted that Sunflower's adoption of this transition policy violated K.A.R. 30-64-21.

On April 29, 1998, Sunflower entered into an affiliation agreement with Rosewood. The agreements between Sunflower and each of its affiliates are similar. One arguably relevant provision, at least in the 1998 agreements, differed somewhat. Sunflower's contract with Rosewood stated that Sunflower "is the *single* contact for county commissioners with regard to funding for individuals with developmental disabilities" (emphasis added), whereas Sunflower's contract with Pathways stated that Sunflower "is the *primary* contact for county

[2] Rosewood originally began as a sole proprietorship, but within a year Ms. Hammond had incorporated Rosewood. This distinction is immaterial for purposes of resolving defendants' motion for summary judgment.

commissioners with regard to funding for individuals with developmental disabilities" (emphasis added).

Ms. Hammond left Sunflower on May 1, 1998, and began operating Rosewood on May 3. At that time, a significant number of clients who had previously received services from Sunflower decided to seek services from Rosewood instead. For comparison purposes, LJW became a Sunflower affiliate in 1997 and served 7-12 clients when it was in business. Pathways became a Sunflower affiliate in 1998 and serves approximately 40 clients. Rosewood serves approximately 90 clients. Sunflower's first corporate financial audit shortly after Rosewood began doing business reported that Sunflower expected revenue losses in the first calendar year of approximately $1.1 million and further noted that if management did not stop this revenue loss it could have a "severe near-term impact" on Sunflower's finances and operations.

For the first time, Sunflower initiated a charge for photocopying client records. LJW is another service provider that was also begun by a former Sunflower employee. No such copy charge had been in place when LJW became a Sunflower affiliate in 1997.

On May 15, 1998, Sunflower denied funding to three consumers who decided they wanted the new day services offered by Rosewood. Sunflower and Rosewood disputed the propriety of the denial of funding for these services.

On June 11, 1998, Sunflower's Council of Community Members, which is a council that is required by statute, complained about Sunflower's new transition policy and the fact that Sunflower did not involve the council in the process of adopting this policy, as was required

by law. The council also objected to Sunflower contacting consumers after they decided to change providers. Sunflower's Carol Carr said that it was the CDDOs responsibility to ensure that consumers made informed decisions. She also stated that Sunflower wanted an opportunity to thank consumers for allowing them to provide services in the past "and to encourage them to contact them [sic] anytime in the future if there are questions or problems."

On August 26, 1998, the Sunflower board discussed its recent financial losses resulting from Rosewood's startup. The board minutes state: "The auditors have a responsibility to ensure that the agency's financial position is secure. With the effects of the 1997 loss, plus the start-up of an affiliate that has reduced current net revenue, the auditors need to verify that there are no on-going negative effects."

Not long after Ms. Hammond began Rosewood, she discussed with Mr. Johnson her thoughts regarding changing the developmental disabilities system to have independent, non-provider CDDOs because a conflict of interest inherently arises by virtue of CDDOs also serving the dual role of being service providers. On September 23, 1998, an organization was formed by a group of providers, parents, guardians, and consumers known as The Alliance for Kansans with Disabilities, Inc. Commonly referred to as "The Alliance," the group promoted awareness of the conflict-of-interest problems caused by the DD Reform Act's creation of CDDOs such as Sunflower, and the fact that CDDOs were also permitted to compete as community service providers.

On October 29, 1998, Sunflower and its affiliates conducted a mediation session because of disputes regarding Sunflower's conduct as CDDO. The affiliates complained about

Sunflower's conflict of interest and the fact that Sunflower administered its CDDO responsibilities in a manner that appeared to be intended to benefit Sunflower's provider operations. A representative from SRS attended the mediation session. Ultimately, it resulted in a consensus resolution that was executed by all.

In November of 1998, Rosewood began serving a client by the name of Kathy White. Sunflower refused Rosewood's requests for funding White's residential services. Rosewood served White without compensation for approximately one year. In November of 1999, White switched her services to Sunflower, at which point Sunflower funded her services. Subsequently, White returned to Rosewood and her services remained funded.

In early 1999, Ms. Hammond began meeting with members of The Alliance regarding the conflict-of-interest problems in the Sunflower service area. Ms. Hammond participated with the group in the spring of 1999 during contract negotiations between SRS, CDDOs, and certain providers. Ms. Hammond believes that Mr. Johnson was aware of her participation with the Alliance because he attended meetings in which she sat next to members of the Alliance. The Alliance's participation in these contract talks was controversial and generally opposed by the CDDOs, most of which were also providers.

On February 23, 1999, the Sunflower board of directors went into an executive session ostensibly for the purpose of discussing "contract matters." In reality, Mr. Johnson called the executive session so that he could deliver a series of allegations against Ms. Hammond and Rosewood in which he charged them with Medicaid fraud, defrauding consumers, disregarding fire safety requirements, engaging in hostile interactions with Mr. Johnson, objecting to the

copying charges that Sunflower assessed for consumer transfers, requesting a share of the county mill levy proceeds that were going solely to Sunflower, and delivering poor service quality. Mr. Johnson said, "[A]t the point in time where the actions of another provider constitute a threat to our organization and the persons served within this region, we as an organization have a responsibility to act accordingly, including the consideration of whether an affiliate agreement is in order." Further, he stated that, "We know for a fact that [Ms. Hammond] is spreading stories and misinformation about our organization."

It is undisputed that some of Mr. Johnson's allegations were in fact false. He did not bring them to Ms. Hammond's attention before the executive session, he did not report them to any regulatory authority, and he did not document his efforts to substantiate or disprove them. Randall Smith resigned from Sunflower's board of directors because of Mr. Johnson's presentation. His February 25, 1999, letter of resignation stated that Mr. Johnson "made allegations of criminal intent by one of the affiliates" during an executive session of the board, which consisted of rumors and innuendos not investigated or reported to the proper authorities. Mr. Smith testified in his deposition that, during the executive session, both Mr. Johnson and Randy Cobb, another Sunflower board member, literally pointed their fingers at Mr. Smith and accused him and other board members of "standing up" for Ms. Hammond and "for not having Sunflower's best interests at heart." Mr. Smith further testified that, during his tenure on the Sunflower board, "there were always issues brought up in director meetings about Rosewood."

Mr. Johnson accepted Mr. Smith's resignation by way of a responsive letter in which Mr. Johnson stated that he made it clear to the board during the executive session that he

presented "only allegations, reported by consumers, and still in need of investigation and input from all parties" before being taken as true. Mr. Johnson stated that he planned to "review each matter with Rosewood staff." He did not, however, review these matters with Rosewood staff.

After the end of the Kansas legislative session in May of 1999, the legislature authorized an audit into the CDDO conflict-of-interest issue and other matters relating to CDDO operations. Ms. Hammond supplied information regarding Sunflower's conflict of interest to a member of The Alliance to forward to the audit staff. Ms. Hammond also provided information directly to the audit staff at their request. Mr. Johnson was aware of the audit and knew that Rosewood was part of the group that had advocated for the audit.

During the fall of 1999, Sunflower refused to fund a Rosewood consumer, Richard Howlier. Ms. Hammond suggested that county mill levy funds might be used to fund Mr. Howlier's services. Mr. Johnson told Ms. Hammond that she would violate Rosewood's affiliation agreement if she tried to access county mill levy funds by speaking directly with county commissioners. Later, the clause in Sunflower and Rosewood's original contract regarding Sunflower being the "single" contact for county commissioners regarding funding was removed from subsequent affiliation agreements. Thereafter, Mr. Johnson did not tell Ms. Hammond that he did not want her to approach the county commission to seek funding. However, Ms. Hammond testified in her deposition that it was clear to her that Mr. Johnson and Sunflower were protective of the county mill levy funds and that it would cause trouble if she sought any such mill levy funds from the county commissioners. Mr. Johnson had told providers and Sunflower's board of directors that efforts to share in Sunflower's county mill

levy funding represented "a total disregard for the needs of the total CDDO population in favor of increasing personal profits." He referred to requests to share these tax dollars as "mill levy sabotage." He described the "critical function" that mill levy receipts play for Sunflower, and explained that Sunflower's children's programs would "be cut drastically" if the mill levy were shared. He stated that Sunflower's programs would be "negatively affected" if affiliates succeeded in their efforts to share in county mill levies.

In October of 1999, Mr. Johnson informed Rosewood that he was concerned about allowing two Sunflower consumers to transition their services to Rosewood. He stated that the proposed transition was not consistent with the consumers' current lifestyle plans, and also that Rosewood had not followed the transition policy. The guardian for those consumers was adamant that a move to Rosewood was in her wards' best interests.

On November 22, 1999, the legislative audit staff released its report regarding CDDO operations. The report concluded that: (1) the DD Reform Act created an inherent conflict of interest by assigning CDDOs the duty of referring clients for services while at the same time allowing them to continue to provide services; (2) CDDOs were not always informing parents and guardians about the availability of other service providers; and (3) CDDOs were required to organize groups at the local level to help resolve disputes, but the composition of those groups appeared to favor CDDOs.

On December 16, 1999, Mr. Johnson sent a letter to Martha Hodgesmith, SRS's Director of Community Support and Services, to confirm a meeting with her to discuss concerns about Sunflower affiliates and to formulate a plan for dealing with his concerns. He

attached a document in which he listed a number of concerns and issues that Sunflower had been unable to resolve "due to the lack of cooperative working arrangements between Sunflower and its affiliates." These included issues such as exploiting consumers for monetary gain, denying consumers services of their choice, attempting to share county mill levy funds, and the hiring by an affiliate (Rosewood) of a former Sunflower employee "for the purpose of going after existing [Sunflower] contracts and consumers." Mr. Johnson had been addressing these kinds of issues with Ms. Hodgesmith previously, since approximately the inception of Rosewood. Mr. Johnson suggested freezing consumer moves to affiliate services until Sunflower was satisfied that certain concerns had been addressed. Ms. Hammond did not know about this correspondence until she obtained copies of these documents during discovery in this lawsuit.

On January 18, 2000, Mr. Johnson again told the Sunflower board that affiliates wanted Sunflower to share its county mill levy and state aid revenue. He stated, "If affiliates succeed in their efforts to press for a share of mil-levy [sic] and state-aid funds, early childhood education, transportation and CDDO administrative costs will be negatively affected." Mr. Johnson believed that it was "extremely inappropriate" for affiliates to advocate for mill levy revenues. Also at this meeting, a board member reported that he believed legislation would pass that would require the CDDO function to be separated from the provider function because of conflict-of-interest issues. The meeting minutes state: "Losing the CDDO funding would leave [Sunflower] without sufficient monies to carry out provider functions." The board directed Mr. Johnson to develop a contingency plan.

A week later, on January 25, 2000, Mr. Johnson wrote to Elizabeth Phelps with SRS, and attached a draft of a document for use "in dealing with [Ms. Hammond] through SRS intervention." In the draft document, Mr. Johnson outlined more allegations against Ms. Hammond and Rosewood, and advocated that enrollments to Rosewood be frozen. He alleged that Rosewood failed to conduct adequate background checks for new staff by failing to check with previous employers. However, Mr. Johnson admitted that no statutes, regulations, or CDDO policies required any such inquiry. Also, he alleged that Rosewood failed to maintain adequate consumer earning levels and he was concerned that Rosewood had violated federal fair labor standards. Despite evidence that Mr. Johnson was legally obligated to report any such suspicions to the United States Department of Labor, he never did so. He also alleged that Rosewood was "recruiting" consumers, yet Sunflower was also accused of recruiting consumers during this same time period. He alleged that Rosewood failed to abide by its contractual obligation to provide Sunflower with a 1998 audit, yet Mr. Johnson had not yet received a 1998 audit from any other provider when he wrote the letter to Ms. Phelps. As with Mr. Johnson's December 16, 1999, correspondence to Ms. Hodgesmith, Ms. Hammond did not know about this correspondence to Ms. Phelps until she obtained copies of these documents during discovery in this lawsuit.

In early 2000, Ms. Hammond traveled to Topeka to visit with a number of legislators to urge a statutory change to require an independent, non-provider CDDO. On February 21, 2000, the House Appropriations Social Services Subcommittee heard testimony on HB 2669, which was designed to prohibit CDDOs from also being service providers. Ms. Hammond

attended the committee meeting. Sometime in February of 2000, Ms. Hammond encountered Mr. Johnson at the capitol building in Topeka.

On March 7, 2000, Sunflower, its affiliates, and SRS met regarding conflicts in the Sunflower service area. Mr. Johnson complained that Sunflower was portrayed in a bad light in the legislative audit report and during the February 21 legislative hearings on HB 2669. On March 9, Ms. Hammond sent a letter to Mr. Johnson apologizing for the "hurtful" things she had said and suggesting they pursue a way to "end the animosity that was so obvious in our meeting with SRS last Tuesday." After Mr. Johnson received this letter, he tried to call Ms. Hammond once or twice but did not follow up because he was not interested in Ms. Hammond's confessed attempt to draw him into some sort of sensitivity training. On March 15, Ms. Hammond again encountered Mr. Johnson at the state capitol.

On March 29, 2000, Mr. Johnson informed the affiliates that he was immediately implementing new CDDO policies and procedures. Among other things, these new procedures required consumers to be escorted by Sunflower employees while interviewing for services with other providers, and required that those interviews occur at Sunflower's offices. Mr. Johnson testified that he wanted a Sunflower employee present at all times "to make sure that there was some fairness, if you will, of how the people were representing their programs." Mr. Johnson wrote that this procedure was "to ensure that no counter-conflict occurs." When the affiliates challenged Mr. Johnson that these new procedures violated K.A.R. 30-64-21, he initially responded that they were "the way it's going to be." On April 14, the executive director of Pathways wrote to Mr. Johnson, objecting to the new CDDO procedures. He

criticized Mr. Johnson for not seeking input from the affiliates before implementing the procedures. On April 25, Rosewood notified Mr. Johnson that it was invoking the regulatory dispute resolution process regarding these new procedures. Ultimately, Mr. Johnson started over. He followed proper procedures, received input on the substance of the policies from the providers, and changed the policies to something the affiliates could live with.

On April 27, 2000, Mark Schulte with SRS completed a new licensing form for Rosewood, and recommended that Rosewood once again receive a full license. By way of background, Rosewood had received full licenses from SRS on October 28, 1998, on April 9, 1999, and again on April 1, 2000.

Around the end of April or the first of May, 2000, Mr. Johnson decided to prepare and deliver an "enforcement action" against Rosewood. He arranged for a meeting on May 15, 2000, between himself, Ms. Hammond, and Mark Schulte with SRS. Mr. Johnson invited Mr. Schulte to the meeting a couple of days beforehand. At that time, Mr. Schulte discussed with his supervisors whether he should attend the meeting, and ultimately decided to attend. Before the meeting began, Mr. Johnson gave Mr. Schulte a copy of a thirteen-page document entitled "Rosewood Services Failure to Comply with Required Regulations and Procedures." It outlined dozens of allegations of alleged violations of state law, regulations, and CDDO policies and procedures. The document concluded: "Based on the frequency and level of severity, Sunflower has sufficient reason to question whether the affiliate agreement with Rosewood should be rescinded." When Ms. Hammond arrived at the May 15 meeting, she was taken into Mr. Johnson's office with Mr. Johnson and Mr. Schulte. She was told to sit silently

while Mr. Johnson read verbatim the thirteen-page document. Once, she tried to speak but Mr. Johnson held up his hand and said, "I'm speaking, you're listening." Ms. Hammond was given a written copy of the document and left Mr. Johnson's office. Shortly after the May 15 meeting, Mr. Schulte mailed a copy of the allegations to his supervisor, Ms. Phelps, at SRS's central office in Topeka.

Mr. Schulte testified that during his career as an SRS employee he had never attended a meeting in which a CDDO presented a long list of complaints against an affiliate. He had never heard of a CDDO reading verbatim page after page of allegations against an affiliate. Notably, Mr. Johnson testified in his deposition that he had never used this method of delivery with any other Sunflower affiliate.

Mr. Johnson had not reported any of his concerns to federal or state regulatory agencies, or to Sunflower's own quality assurance committee, which has responsibility over such matters pursuant to K.A.R. 30-64-27. He did not report his concerns regarding alleged federal wage and hour violations to the United States Department of Labor. And he did not report his suspicions of consumer exploitation, neglect, and abuse to SRS's division of Adult Protective Services.

On May 26, 2000, Rosewood once again notified Mr. Johnson that it was invoking the regulatory dispute resolution process to address the allegations raised in the thirteen-page enforcement action. On June 1, Ms. Hammond attempted to provide Mr. Johnson with documentation to show that the allegations he made in the enforcement action were false, but Mr. Johnson refused to accept or review that documentation.

On June 5, 2000, Mr. Schulte came to Ms. Hammond's office and suggested that SRS assemble a team of staff members to conduct a licensing review of Rosewood. That way, SRS could either identify the problems and fix them, or "put them to bed." Ultimately, SRS supervisors in Topeka decided to put the licensing review on hold.

On June 23, 2000, Rosewood submitted a thirty-five-page rebuttal to Mr. Johnson's enforcement action. The rebuttal included fifteen attachments and signed statements from guardians and staff refuting Mr. Johnson's allegations virtually line by line.

On July 18, 2000, Carol Carr with Sunflower completed a policy compliance checklist for all of the service providers. The checklist revealed that Rosewood was the only provider in Sunflower's service area that was completely in compliance with all CDDO policy requirements. Sunflower was in compliance with all but one item, Pathways was in compliance with all but five items, and LJW was in compliance with many, but not all, of the items. As a result of the checklist, Ms. Carr sent requests to the various affiliates (other than Rosewood) to solicit compliance with the items not checked.

On October 6, 2000, Sunflower and Rosewood engaged in mediation regarding Mr. Johnson's thirteen-page enforcement action. As a result, Sunflower withdrew the allegations and recommended that no one else use them. Mr. Johnson also apologized for his manner of delivering the allegations, which he acknowledged was "inappropriate, insensitive, and caused great embarrassment." The mediation agreement did not include a release of liability.

On March 28, 2001, Rosewood sent a letter to Sunflower reporting a list of twelve clients receiving unfunded services. Rosewood asked that Sunflower check to make sure the

twelve were correctly included in Sunflower's records so that they could obtain funding for services. In late March, state representative Bethell obtained a list of these consumers and spoke to SRS representatives. On April 23, SRS sent a response letter to Bethell informing him that all unfunded persons would be funded as of July 1, 2001. The letter noted that in some instances, Rosewood began providing services for persons who had not been approved by the CDDO, thus circumventing the application and waiting list process. The letter concluded that Rosewood should follow the process in place, which required persons seeking services to apply through the CDDO.

In April of 2001, Rosewood was once again issued a full license by SRS.

In mid-2001, Ms. Hammond spoke to two members of the board of commissioners of Barton County about the independent CDDO issue. On October 8, 2001, at the request of the county commission, all area service providers attended a meeting to address whether Barton County should seek permission from SRS to replace Sunflower with an independent, non-provider CDDO. Ms. Hammond and a representative of Pathways supported a move to an independent CDDO. Mr. Johnson appeared in opposition. Two days later, Mr. Johnson called and wrote to SRS officials in Topeka asking for their intervention in stopping Barton County from replacing Sunflower with an independent, non-provider CDDO. In essence, Mr. Johnson asked that SRS communicate to the Barton County commission that the issues that had been identified could be addressed without a change in CDDOs. Mr. Johnson was frustrated and upset by the county commission's review of the independent CDDO issue.

In October of 2001, Randy Cobb, a Sunflower board member, gave a copy of Rosewood's 1999-2000 audited financial statements to a local newspaper reporter. Some time later, Mr. Cobb gave Rosewood's 1999-2000 and 2000-2001 audited financial statements to a member of the community to review for purposes of writing a letter to the editor of a local newspaper on the issue of an independent CDDO.

On December 2, 2001, Mr. Johnson wrote a 10-page letter to Ms. Phelps at SRS declaring that action must be taken against Rosewood. Mr. Johnson accused Rosewood of Medicaid fraud, federal wage and hour violations, tax evasion, consumer exploitation, and literally dozens of other offenses. Mr. Johnson stated that if the Barton County action was not stopped, it would "destroy" the system. He continued, "The action taken by the Barton County Commissioners to develop an independent CDDO, now leads Sunflower to take the following action: . . . establish a resolve to bring about a solution to questionable practices by Rosewood." Mr. Johnson also wrote, "[T]he concern remains that much damage will be done before solutions are initiated, as witnessed by the recent actions taken by the Barton County Commissioners." Mr. Johnson then outlined the action he intended to take against Rosewood, and proposed action that SRS should take. He warned, "I recognize that the current politics surrounding the action by Barton County Commissioners requires that this not appear to be retaliation." He also stated, "In Rosewood's case, we believe we have sufficient reason to cancel our affiliation agreement." Ms. Phelps circulated Mr. Johnson's letter to her superiors, Ms. Hodgesmith and Laura Howard.

On December 21, 2001, Rosewood received a compliance summary from SRS that raised four issues: (1) no arrangements had been made for a client who wished to change service providers; (2) an incident in November of 2001 in which a Rosewood staff member left a consumer unattended in a van with the keys in the vehicle and the consumer took the van, drove it to Junction City, was apprehended by police, and was returned to Rosewood; (3) Rosewood's failure to report the van incident to Adult Protective Services until a week after the incident; and (4) Rosewood's failure to keep adequate financial records on clients. After further investigation, some of these allegations were eventually modified or dropped. Ms. Hammond met with Ms. Phelps from SRS and they entered into an agreed corrective action plan. Rosewood met the corrective plan within a relatively short period of time and its full license was restored.

On March 29, 2002, Ms. Hammond and Rosewood filed the instant lawsuit against Sunflower and Mr. Johnson.

In March or April of 2002, Ms. Hammond attended a Great Bend city council meeting and invited the council members to tour Rosewood's facility. Randy Cobb, a Sunflower board member, called two city council members and the city administrator in an effort to discourage the visit because it would raise the appearance of the city council "taking sides" in the conflict between Rosewood and Sunflower. Ultimately, none of the city council members visited Rosewood to tour its facilities.

In April of 2002, Mr. Johnson prepared a document analyzing the tier movement of clients of Sunflower, Rosewood, LJW, and Pathways. Developmentally disabled persons (*i.e.*,

clients) are evaluated according to a tier system numbered 0 through 5. This system is used for funding reimbursement purposes as a partial indicator of the services needed for the client. Clients in lower tier levels receive more funding for services than clients in higher tier levels. The document that Mr. Johnson prepared analyzed the tier movement of affiliates' clients since 1998. Mr. Johnson provided a copy of his tier movement analysis to Ms. Phelps at SRS.

On April 8, 2002, during an affiliate meeting, while Mr. Johnson was discussing consumer issues, he slammed his hand down on a table near Ms. Hammond and yelled at her. Mr. Johnson has never conducted himself in a similar fashion toward any other affiliate during a provider meeting.

The Barton County commission voted to begin the process with SRS to replace Sunflower with an independent, non-provider CDDO. Barton County sent out a public hearing notice as required in K.A.R. 30-64-12(a)(6) regarding this decision. At the request of the county commission, Rosewood sent out a letter to its consumers, their guardians, and families. In January of 2003, the public hearing was held. Rosewood made a presentation to the members of the board of commissioners urging them to establish an independent CDDO. Plaintiffs claim that, at this meeting, Mr. Johnson made negative comments about Rosewood. An accountant named John Cross also testified at the meeting. He presented information on Rosewood's financial status and submitted written copies of Rosewood's financial statements. Mr. Cross did not talk about the income of other Sunflower affiliates. Mr. Cross later sent a letter to Rosewood apologizing for his comments.

Based on these facts, Ms. Hammond and Rosewood assert claims pursuant to 42 U.S.C. § 1983, alleging that Sunflower and Mr. Johnson violated their constitutional right to equal protection of the laws and retaliated against them for exercising their First Amendment rights. Defendants contend they are entitled to summary judgment on all of plaintiffs' claims. Defendants argue that: (1) Ms. Hammond does not have standing to assert claims against defendants; (2) the statute of limitations bars some of Rosewood's claims; (3) there is insufficient evidence to support Rosewood's claims; (4) defendants did not act under color of state law; (5) defendants are entitled to qualified immunity; (6) Rosewood's claims against Sunflower fail because there is no evidence to support the existence of an illegal custom, practice, or policy adopted by Sunflower; and (7) Rosewood's claims based on Mr. Johnson's delivery of the thirteen-page enforcement action are barred by the doctrines of settlement and release and accord and satisfaction.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Spaulding v. United Transp. Union*, 279 F.3d 901, 904 (10th Cir. 2002). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Wright ex rel. Trust Co. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231-32 (10th Cir. 2001) (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)). An issue of fact is "genuine"

if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Adler*, 144 F.3d at 670 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Spaulding*, 279 F.3d at 904 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Adams v. Am. Guar. & Liab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000) (citing *Adler*, 144 F.3d at 671).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Spaulding*, 279 F.3d at 904 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)); *see also Anderson*, 477 U.S. at 256; *Celotex*, 477 U.S. at 324. The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256; *Eck v. Parke, Davis & Co.*, 256 F.3d 1013, 1017 (10th Cir. 2001). Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Mitchell v. City of Moore*, 218 F.3d 1190, 1197-98 (10th Cir. 2000) (quoting *Adler*, 144 F.3d at 671). To accomplish this, the facts "must be identified by reference to an affidavit, a deposition transcript, or a specific exhibit incorporated therein." *Adams*, 233 F.3d at 1246.

Finally, the court notes that summary judgment is not a "disfavored procedural shortcut"; rather, it is an important procedure "designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

ANALYSIS

For the reasons explained below, the court agrees with defendants that Ms. Hammond lacks standing to assert claims against defendants. Further, Rosewood's claims are largely barred by the statute of limitations insofar as they involve defendants' conduct prior to March 29, 2000. However, Rosewood has raised genuine issues of material fact regarding the viability of both its equal protection and First Amendment retaliation claims as well as the issue of whether defendants acted under color of law when they committed the alleged constitutional violations. Mr. Johnson has failed to demonstrate, at least based on the present state of the record, that he is entitled to qualified immunity for his actions and the court is also unpersuaded that Sunflower should be dismissed from this lawsuit entirely. The court further holds that, as a matter of law, the parties' mediation agreement does not bar Rosewood's claims based on Mr. Johnson's delivery of the thirteen-page enforcement action.

I. Ms. Hammond's Standing

Those who seek to invoke federal court jurisdiction must satisfy the case-or-controversy requirement of Article III of the Constitution. *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003). Standing is an essential part of this case-or-controversy requirement. *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311

F.3d 1220, 1226 (10th Cir. 2002). In resolving the issue of standing, the court must consider both constitutional and prudential standing requirements. *Sac & Fox Nation v. Pierce*, 213 F.3d 566, 573 (10th Cir. 2000). The constitutional component requires the plaintiff to demonstrate three elements: "(1) injury-in fact, (2) causation, and (3) redressability." *Z.J. Gifts*, 311 F.3d at 1226. The first of these requires a litigant to "establish its *own* injury in fact." *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 821 (10th Cir. 1999) (emphasis in original; quotation omitted). Similarly, the prudential component of standing requires, among other things, that "a plaintiff must assert his 'own rights, rather than those belonging to third parties.'" *Bd. of County Comm'rs v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002) (quoting *Sac & Fox Nation*, 213 F.3d at 573). On a motion for summary judgment, the plaintiff bears the burden to establish that no genuine issue of material fact exists as to justiciability. *Essence, Inc. v. Fed. Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002).

Here, defendants argue that Ms. Hammond does not have standing to assert a § 1983 claim based on injuries to Rosewood. The court agrees. It is well settled that shareholders cannot sue under § 1983 for injuries to the corporation, *Pothoff v. Morin*, 245 F.3d 710, 717 (8th Cir. 2001); *Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981); *Ehrlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969); *see also Diva's, Inc. v. City of Bangor*, 176 F. Supp. 2d 30, 39 (D. Me. 2001), "even in situations where they are sole stockholders of the victim corporation," *Colon-Pratts v. San Sebastian*, 194 F. Supp. 2d 67, 72 (D. Puerto Rico 2002). When an individual incorporates a company, that individual relinquishes the right to seek direct

legal redress under § 1983 for injuries suffered by him or her as the corporation's sole shareholder and principal employee. *Pothoff*, 245 F.3d at 717.

In this case, Rosewood, not Ms. Hammond, suffered all of the alleged injuries. All of the complained-of conduct involves defendants' actions toward Rosewood. Defendants allegedly unjustifiably denied funding to Rosewood, subjected Rosewood to closer scrutiny than other affiliates, and implemented policies that negatively impacted Rosewood. Ms. Hammond has failed to segregate any claims of hers from those asserted by Rosewood. Insofar as Mr. Johnson directed his actions at Ms. Hammond by, for example, slamming his hand on the table and yelling at her, Ms. Hammond was only involved in that incident by virtue of her capacity as a representative of Rosewood. Also, regardless of whether Ms. Hammond was acting in her own capacity or in her capacity as a representative of Rosewood when she exercised her First Amendment rights by, for example, engaging in various lobbying activities, any corresponding injury suffered by virtue of defendants' alleged retaliation was suffered by Rosewood, not Ms. Hammond. *See, e.g.*, *Colon-Pratts*, 194 F. Supp. 2d at 73 (explaining that even if the retaliatory conduct was triggered by the exercise of the individual's First Amendment rights, any resulting harm was actually that of the corporation).

Thus, because Ms. Hammond has failed to identify any actual or threatened injury or legally protectable right separate and apart from those inherent to Rosewood, Ms. Hammond's claims fail for lack of standing. Accordingly, defendants' motion for summary judgment is granted on all of Ms. Hammond's claims and Ms. Hammond is hereby dismissed from this lawsuit.

II. Statute of Limitations

In § 1983 actions, federal courts apply the state statute of limitations for personal injury claims, which, in Kansas, is two years. *Laurino v. Tate*, 220 F.3d 1213, 1218 (10th Cir. 2000) (holding the district court properly applied a two-year statute of limitations to plaintiff's § 1983 claims); *Johnson v. Johnson County Comm'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991) (holding the two-year statute of limitations for personal injury actions found in K.S.A. § 60-513(a)(4) applies to § 1983 claims). Plaintiffs filed this lawsuit on March 29, 2002. Therefore, plaintiffs' claims are timely insofar as they are based on defendants' conduct since March 29, 2000.

While state law governs statute of limitations issues, federal law determines the accrual of § 1983 claims. *Baker v. Bd. of Regents*, 991 F.2d 628, 632 (10th Cir. 1993). A civil rights claim does not accrue until "facts that would support a cause of action are or should be apparent." *Fratus v. DeLand*, 49 F.3d 673, 675 (10th Cir. 1995) (quotation omitted). Thus, the cause of action accrues "when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Baker*, 991 F.2d at 632; *see also Smith v. Enid ex rel. Enid City Comm'n*, 149 F.3d 1151, 1154 (10th Cir. 1998) (holding § 1983 claims accrue "when the plaintiff knows or should have known that his or her constitutional rights have been violated"). In this case, Rosewood did not know nor did it have reason to know that its constitutional rights were arguably violated when Mr. Johnson sent documents to SRS on December 16, 1999, and January 25, 2000, because Rosewood did not know about these documents until it obtained copies during discovery in this lawsuit. Therefore, Rosewood's claims based on these two

documents are not time-barred. Otherwise, though, Rosewood's claims are time-barred to the extent they rely on conduct by defendants that occurred before March 29, 2000.

Plaintiffs, however, argue that the continuing violation doctrine applies to save their claims based on conduct that occurred before March 29, 2000. The court disagrees. The Tenth Circuit has not decided the precise issue of whether the continuing violation doctrine applies to § 1983 cases. *Holmes v. Regents of the Univ. of Colo.*, 176 F.3d 488 (10th Cir. 1999) (unpublished opinion), *text available at* No. 98-1172, 1999 WL 285826, at *3 n.2 (10th Cir. May 7, 1999) ("This court has never specifically held whether the continuing violation theory applies to claims brought under 42 U.S.C. § 1983."). However, in *Thomas v. Denny's, Inc.*, 111 F.3d 1506 (10th Cir. 1997), the Tenth Circuit evaluated whether the continuing violation doctrine applies to a claim pursuant to 42 U.S.C. § 1981. *Id.* at 1513-14. The court reasoned that "the continuing violation theory is a creature of the need to file administrative charges [in Title VII cases], and because a section 1981 claim does not require filing such charges before a judicial action may be brought, the continuing violation theory is simply not applicable." *Id.* at 1514. By analogy, the same rationale applies to a § 1983 claim where, as here, plaintiffs were not required to file any administrative charges before filing this lawsuit. *See, e.g., Rassam v. San Juan College Bd.*, 113 F.3d 1247 (10th Cir. 1997) (unpublished opinion), *text available at* No. 95-2292, 1997 WL 253048, at *3 (10th Cir. May 15, 1997) (collecting case law on this issue and noting that courts have been reluctant to apply the doctrine outside of the employment discrimination context). Indeed, this has been the result uniformly reached by judges throughout this district. *See, e.g., McCormick v. Farrar*, No. 02-2037-GTV, 2003 WL

1697686, at *4 (D. Kan. Mar. 20, 2003) (declining to apply the continuing violation doctrine in the context of a § 1983 claim); *Ratts v. Bd. of County Comm'rs*, 141 F. Supp. 2d 1289, 1313 (D. Kan. 2001) (same). Therefore, the continuing violation doctrine does not apply to plaintiffs' § 1983 claims in this lawsuit.

Thus, the following actions by defendants fall within the applicable statute of limitations: the documents that Mr. Johnson sent to SRS dated December 16, 1999, and January 25, 2000, as well as conduct by defendants that took place on or after March 29, 2000. Insofar as Rosewood's claims are based on any other conduct by defendants, defendants' motion for summary judgment is granted based on the statute of limitations. Of course, although plaintiffs' claims may not be based on other actions taken by defendants before March 29, 2000, those prior actions may nevertheless be relevant to other facets of this case such as showing the factual background between the parties and proving that defendants acted with the requisite degree of intent.

III. Potential Viability of Plaintiffs' Claims

A plaintiff must show at least two elements in order to support a claim under 42 U.S.C. § 1983: (1) that he or she has been deprived of a right secured by the Constitution and laws of the United States; and (2) that the alleged deprivation was committed by a person acting under color of law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Tool Box v. Ogden City Corp.*, 316 F.3d 1167, 1175 (10th Cir. 2003). For the reasons explained below, the court is of the opinion that Rosewood has demonstrated genuine issues of material fact regarding whether defendants violated Rosewood's constitutional right to equal protection of the laws and retaliated against

Rosewood for Ms. Hammond's exercise of First Amendment rights, as well as whether, in doing so, defendants acted under color of law.

A. Plaintiffs' Equal Protection Claims

The Fourteenth Amendments' Equal Protection Clause prohibits the state from denying to any person the equal protection of the laws. This is essentially a directive "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The Supreme Court has "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam); *Bartell v. Aurora Pub. Sch.*, 263 F.3d 1143, 1149 (10th Cir. 2001). Under this class-of-one theory, plaintiffs must prove that they were singled out because of defendants' animosity toward them—that is, that defendants' actions were "a spiteful effort to 'get' [plaintiffs] for reasons wholly unrelated to any legitimate state objective." *Bartell*, 263 F.3d at 1149 (quotation omitted). Of course, plaintiffs must also demonstrate they were treated "differently than another who is similarly situated." *Id.* (quotation omitted).

Defendants argue that Rosewood cannot compare itself with the other service providers in Sunflower's area because Rosewood has more than twice the client base of the next largest affiliate and a much bigger operating budget to match. Defendants contend that Rosewood simply has more clients and more issues that require Sunflower's attention than other affiliates. The court finds this reasoning unpersuasive. The simple fact is that Sunflower,

Rosewood, LJW, and Pathways are all service providers in the five-county area, and presumably they should all be treated similarly and held to the same service provider standards.

Defendants also argue that Rosewood has failed to demonstrate that it was treated differently than other service providers. Again, the court disagrees. In Mr. Johnson's January 25, 2000, letter to SRS, he advocated that enrollments to Rosewood, not other providers, be frozen. He also reported that Rosewood failed to provide its 1998 audit to Sunflower, yet he neglected to mention that he had also not received the other service providers' 1998 audits, either. Further, even Mr. Johnson admitted that he has never read allegations verbatim to any other service provider in the same manner that he delivered the thirteen-page enforcement action to Ms. Hammond on May 15, 2000. Indeed, only approximately two months later, in July of 2000, Ms. Carr with Sunflower simply sent requests to the other providers soliciting compliance with Sunflower's policies. Mr. Johnson slammed his hand down on a table and yelled at Ms. Hammond during a provider meeting, whereas he has never conducted himself in a similar fashion toward any other affiliate. In sum, there is adequate evidence in the record from which it can be inferred that Sunflower treated Rosewood differently than other service providers by generally subjecting Rosewood to a higher degree of scrutiny than other service providers and by raising a variety of obstacles to attempt to stem the tide of clients transitioning their services to Rosewood.

There is also sufficient evidence in the record from which it can be inferred that Mr. Johnson acted out of personal animosity and spite toward Ms. Hammond. As early as 1998, Mr. Johnson told Ms. Hammond that he could throw a wrench into her plans. Then, Sunflower

lost a significant number of clients to Rosewood along with the corresponding funding for those clients. Mr. Johnson repeatedly made serious allegations against Rosewood that appear to have been (at least, based on the present state of the record) largely unfounded. He repeatedly attempted to implement policies that would hinder clients from transitioning their services to Rosewood. He made Ms. Hammond sit silently while he read verbatim a thirteen-page enforcement action which she later refuted line by line. He slammed his fist down on a table and yelled at her. Collectively, these facts create a genuine issue of material fact regarding whether defendants acted with the requisite degree of purposeful discrimination against Rosewood.

The record is wholly insufficient for the court to determine as a matter of law that defendants' actions were also related to a legitimate state objective. According to defendants' theory of the case, Mr. Johnson's actions very well may have been justified if he was legitimately concerned about Rosewood mistreating, exploiting, abusing, and neglecting consumers, committing statutory and regulatory violations, and engaging in shady financial dealings. However, it is noteworthy that there is no evidence that Mr. Johnson ever reported these concerns to anyone other than Rosewood and SRS—not to Sunflower's own quality assurance committee, nor to the United States Department of Labor, nor to any other legitimate authority. Notably, despite Mr. Johnson's repeated pleas to SRS for assistance and intervention, SRS repeatedly issued Rosewood full licenses. Thus, plaintiff has raised a genuine issue of material of fact regarding whether defendants' actions were related to a legitimate state objective.

In sum, Rosewood has raised a genuine issue of material fact regarding whether defendants violated its equal protection rights. *See generally, e.g.*, *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995) (Posner, C.J.) (reversing the district court's order of dismissal; holding the plaintiff stated an equal protection claim where he alleged the mayor had orchestrated a campaign of harassment against him out of sheer malice). Accordingly, defendants' motion for summary judgment on that basis is denied.

B. Plaintiffs' First Amendment Retaliation Claims

"[T]he purpose behind the Bill of Rights, and of the First Amendment in particular[, is] to protect unpopular individuals from retaliation--and their ideas from suppression--at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *accord Am. Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092, 1103 (10th Cir. 1997) (quoting *McIntyre*). Thus, "the First Amendment bars retaliation for protected speech." *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998). In fact, "[a]ny form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom." *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000) (quotation omitted), *cert. denied*, *Turner v. Worrell*, 533 U.S. 916 (2001).

In evaluating First Amendment retaliation claims outside of the public employment context, the court will apply the substantive standard announced by the Tenth Circuit in

Worrell.[3] *McCormick v. City of Lawrence*, 253 F. Supp. 2d 1172, 1191 (D. Kan. 2003). Under this standard, a plaintiff must establish the following three elements:

> (1) that the plaintiff was engaged in constitutionally protected activity; (2) that the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct.

Worrell, 219 F.3d at 1212 (quotations omitted).

Here, with respect to the first element, the court has little difficulty concluding (and indeed defendants do not even attempt to dispute) that Ms. Hammond engaged in constitutionally protected activity. Certainly her lobbying efforts and the fact that she provided information to a legislative audit committee are protected activities. Advocating that the developmental disabilities system in Kansas should be changed to require independent, non-provider CDDOs can fairly be characterized as a matter of public concern because it involves the organizational structure within which community services are delivered to developmentally disabled persons. *See Burn v. Bd. of County Comm'rs*, 330 F.3d 1275, 1285-86 (10th Cir. 2003) (setting forth the standard for whether the speech at issue touches on a matter of public concern); *see also Hulen v. Yates*, 322 F.3d 1229, 1238 (10th Cir. 2003) ("[S]peech which

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[3] Defendants have used *Worrell*'s legal framework to analyze Rosewood's First Amendment retaliation claims, and Rosewood does not dispute that this is the appropriate legal standard for the court to apply. The court wishes to note that even if it were more appropriate to apply the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968), defendants would still not be entitled to summary judgment on Rosewood's First Amendment retaliation claims.

touches on matters of public concern does not lose protection merely because some personal concerns are included.").

Defendants' arguments focus on the second element in *Worrell*. Defendants first argue that plaintiffs did not suffer *any* injury by virtue of defendants' conduct and, second, that defendants' conduct would not chill a person of ordinary firmness from continuing to engage in that activity. The court is unpersuaded that Rosewood did not suffer any injury by virtue of defendants' alleged retaliation. Defendants make much of the fact that Sunflower never took any enforcement action against Rosewood and that there is no evidence that Rosewood suffered financially, had its license revoked, or lost any clients as a result of defendants' actions. However, as used in this context, "injury" is not equivalent to suffering compensatory damages. Rather, it more broadly encompasses any consequences caused by defendants' conduct that would chill a person of ordinary firmness from continuing to exercise their First Amendment rights.

Thus, the court's inquiry must focus "upon whether a *person of ordinary firmness* would be chilled, rather than whether the particular plaintiff is chilled." *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001) (emphasis in original). Here, in December of 1999, Mr. Johnson suggested freezing consumer moves to affiliates until his concerns had been addressed. In January of 2000, he solicited SRS's intervention in dealing with Rosewood. In May of 2000, Ms. Hammond was forced to sit through an undoubtedly very embarrassing moment when Mr. Johnson read verbatim the thirteen-page enforcement action in front of a representative of SRS, Rosewood's licensing authority. She was essentially compelled to put

forth the time and effort necessary to compile a rebuttal document accompanied by corroborating affidavits. Rosewood was then threatened with a licensing review conducted by a team of staff members from SRS. Ms. Hammond had to devote time and effort to attend a mediation session in October of 2000. Then, Mr. Johnson's letter to SRS in December of 2001 threatened to rescind Rosewood's affiliation agreement and appears to have been the impetus behind the SRS compliance summary later that month which ultimately resulted in Rosewood fulfilling a corrective action plan in order to have its provider license fully restored. Highly summarized, because of Sunflower's conduct, Rosewood was threatened with the loss of its affiliation agreement and provider license and, therefore, was potentially threatened with effectively being put out of business. This would certainly chill a person of ordinary firmness from continuing to advocate for the reform of the DD Reform Act's CDDO structure.

The third element of the *Worrell* test is whether "the defendant's adverse action was substantially motivated as a response to the plaintiff's exercise of constitutionally protected conduct." *Worrell*, 219 F.3d at 1212. Defendants argue that its conduct toward Rosewood was motivated by "nothing more than an attempt to fulfill the role of CDDO." However, drawing all reasonable inferences in favor of Rosewood, as the court must, it can reasonably be inferred that Mr. Johnson's activities were substantially motivated as a response to Ms. Hammond's lobbying activities. Less than a month after the results of the legislative audit regarding the CDDO structure were released in November of 1999 (which were notably unfavorable from Sunflower's standpoint), Mr. Johnson sent letters to SRS in December of 1999 and again in January of 2000 complaining about Rosewood's activities. After Mr. Johnson encountered

Ms. Hammond at the capitol building in Topeka in February 2000 and again in March 2000, Mr. Johnson implemented a new CDDO policy on March 29, 2000, regarding transitioning service providers. Less than two months later, he delivered the thirteen-page enforcement action. In the midst of the Barton County commission's decision to replace Sunflower with an independent, non-provider CDDO, Mr. Johnson sent a letter to SRS suggesting that Rosewood's affiliation agreement be rescinded.

In sum, Rosewood has raised a genuine issue of material fact regarding its First Amendment retaliation claim. Accordingly, defendants' motion for summary judgment on this basis is denied.

C. Under Color of Law

In order for a plaintiff to state a cause of action under § 1983, the challenged conduct must constitute state action, *Tool Box v. Ogden City Corp.*, 316 F.3d 1167, 1175 (10th Cir. 2003), or, in other words, the defendant must have been acting "under color of law" when it allegedly violated plaintiff's constitutional rights, *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1447 (10th Cir. 1995) (citing *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988)). Thus, "'the conduct allegedly causing the deprivation of a federal right' must be 'fairly attributable to the State.'" *Tool Box*, 316 F.3d at 1175 (quoting *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982)).

"Taking a flexible approach to an inherently murky calculation," courts use four different tests to determine whether conduct occurred under color of state law: the (1) public function, (2) nexus, (3) joint action, and (4) symbiotic relationship tests. *Tool Box*, 316 F.3d

at 1175; *see also Gallagher*, 49 F.3d at 14477 (discussing these four tests). Under the public function test, the "court determines whether a private entity has exercised 'powers traditionally exclusively reserved to the State.'" *Tool Box*, 316 F.3d at 1176 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974); listing holding elections, performing necessary municipal functions, and running a nursing facility as powers that were traditionally exclusively reserved to the state); *accord Johnson v. Rodrigues (Orozco)*, 293 F.3d 1196, 1203 (10th Cir. 2002) (same). Under the nexus test, the court examines whether the nexus between the government and the challenged conduct is so close that the conduct may be fairly treated as that of the state itself. *Tool Box*, 316 F.3d at 1176. "That is, a state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.* (quotations omitted). Under the joint action test, state action exists if a private party willfully participates in joint action with the state by acting in concert to effect a deprivation of constitutional rights. *Id.* (quoting *Dennis v. Sparks*, 449 U.S. 24, 27 (1980)). Lastly, under the symbiotic relationship test, a private party may be considered a state actor "if the state 'has so far insinuated itself into a position of interdependence' with a private party that 'it must be recognized as a joint participant in the challenged activity.'" *Id.* (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)). This, however, is a tough standard to satisfy that requires more than "extensive state regulation, the receipt of substantial state funds, and the performance of important public functions." *Id.* (quotation omitted).

Recently, the Supreme Court in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288 (2001), supplemented and clarified that these tests are entwined in the sense that all four "are, for all intents and purposes, tools for factual analysis that 'bear on the fairness of . . . an attribution [of state action.]'" *Tool Box*, 316 F.3d at 1176 (quoting *Brentwood*, 531 U.S. at 296). Under *Brentwood*, courts are to "apply the tests only so far as they force courts to zero in on the fact-intensive character of a state action determination." *Id.*

Sunflower, in its capacity as CDDO for the five-county area, serves a public governmental function, albeit its powers are perhaps not the type traditionally reserved *exclusively* to the government. The five counties in Sunflower's service area have delegated to Sunflower authority for administering the developmental disability system within their boundaries. Under the DD Reform Act, CDDOs have authority over service providers' eligibility, quality assurance, and funding. Sunflower also serves as the gateway for service providers to receive public funds. Thus, Sunflower presumably has the power to effectively put service providers out of business by, for example, denying them funding and rescinding their affiliation agreements if Sunflower is dissatisfied with their program quality. This is not just a situation in which Sunflower is a regulated entity that receives government funding; rather, here Sunflower itself serves the governmental function of regulating other private

parties' conduct[4] and controlling how public funds are disbursed. Sunflower is, for practical purposes, akin to a government agency.

Further, state and local governmental entities have to some degree insinuated themselves into positions of interdependence with CDDOs such as Sunflower. SRS and the county governments in Sunflower's five-county service area have entrusted Sunflower with the responsibility to disburse their monies and have authorized Sunflower to effectively regulate private parties. The majority of Sunflower's board of directors is appointed by the county commissioners of those counties, presumably to ensure that Sunflower carries out these responsibilities appropriately. Further, as evidenced by the record presently before the court, Sunflower routinely works with SRS in determining how to deal with allegedly noncompliant service providers. While these considerations do not rise to the level of suggesting that the county commissions or SRS were joint participants or fellow conspirators in Sunflower's arguable violations of Rosewood's constitutional rights, it can nevertheless reasonably be inferred that the county commissions and SRS could have exercised some influence over Mr. Johnson by either encouraging or discouraging him from following the precise course of conduct that he chose to follow with respect to Rosewood.

On balance, the court is persuaded that these considerations raise a genuine issue of material fact regarding whether Mr. Johnson and Sunflower engaged in conduct that can fairly

[4] By defendants' own admission, Sunflower "at least to some extent assists SRS in regulating the provision of services to members of the public with developmental disabilities" (Doc. 88, at 29).

be attributed to the state and county governments.[5] Sunflower administers components of the developmental disabilities program, which most certainly serves a public purpose, and SRS and county governments remain entwined in Sunflower's administration of that program. *See Brentwood*, 531 U.S. at 296 ("We have . . . held that a challenged activity may be state action . . . when it is entwined with governmental policies or when government is entwined in [its] management or control." (quotation omitted)); *see generally, e.g.*, *Evans v. Newton*, 382 U.S. 296 (1966) (holding that private trustees of a park formerly owned by the city were state actors because the park served the public purpose of providing community recreation and the municipality remained entwined in the management and control of the park). Further, Mr. Johnson and Sunflower were acting under color of law when at least some of the alleged

[5] The court is aware that two other cases in this district have discussed the potential liability under federal law of entities similar in nature to Sunflower: *Ormsby v. C.O.F. Training Servcs., Inc.*, 194 F. Supp. 2d 1177 (D. Kan. 2002), and *Dow v. Terramara, Inc.*, 835 F. Supp. 1299 (D. Kan. 1993). While these cases are somewhat helpful to a general understanding of the roles played by the various types of entities such as SRS, county governments, CDDOs, and service providers in the developmental disability system in Kansas, neither of these cases provide much assistance in resolving the § 1983 state action issue in this case. *Ormsby* involved a determination of whether the defendant CDDO was an arm of the state for Eleventh Amendment immunity purposes. Although *Dow* involved the issue of whether an entity similar in nature to Sunflower was a state actor for § 1983 liability purposes, that case was decided in 1993, before the DD Reform Act that created the CDDO structure was enacted.

denials of Rosewood's constitutional rights occurred.[6] Accordingly, defendants' motion for summary judgment on this basis is denied.

IV. Qualified Immunity

Rosewood seeks a declaratory judgment, injunctive relief to prevent future constitutional violations by defendants, punitive damages, and attorneys' fees pursuant to 42 U.S.C. § 1988. It is undisputed that qualified immunity does not apply to Rosewood's claims for equitable (*i.e.*, declaratory and injunctive) relief. *See Kikumura v. Hurley*, 242 F.3d 950, 962-63 (10th Cir. 2001) (qualified immunity does not bar injunctive relief); *Cannon v. City and County of Denver*, 998 F.2d 867, 876 (10th Cir. 1993) (qualified immunity does not bar declaratory and injunctive relief). Further, qualified immunity shields only public officials from personal liability under § 1983. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("We therefore hold that *government officials* . . . are shielded from liability . . . ." (emphasis added)); *Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1255 (10th Cir. 1998) ("Qualified immunity shields *government officials* . . . from individual liability . . . ." (emphasis added)). Therefore, qualified immunity only potentially shields Mr. Johnson, not Sunflower, from liability in this case and only with respect to Rosewood's claims for punitive damages and § 1988 attorneys' fees.

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[6] The court recognizes the possibility that Mr. Johnson may not have been acting under color of law with respect to some of the conduct at issue. However, the parties' briefs only categorically argue about the issue of whether defendants were acting under color of law. They do not address specific instances of conduct by Mr. Johnson. Therefore, given the fact that the parties have not discussed this issue in the context of any particular instances of conduct, the court will similarly categorically deny defendants' motion for summary judgment on this basis.

When, as here, the defendant is a private actor rather than an employee of a governmental entity, the court must determine whether qualified immunity is categorically available to that individual because private actors are not necessarily shielded from liability under § 1983 by the same immunity afforded to public officials. *Richardson v. McKnight*, 521 U.S. 399, 402-04 (1997). Ordinarily, once a defendant raises a qualified immunity defense, a plaintiff has the burden to overcome that defense. *Verdecia v. Adams*, 327 F.3d 1171, 1174 (10th Cir. 2003) (plaintiff has the burden to show that, taking all reasonable inferences in favor of the plaintiff, the official violated a constitutional or statutory right, and that the constitutional or statutory right was clearly established when the alleged violation occurred); *Sh. A. ex rel. J.A. v. Tucumcari Mun. Sch.*, 321 F.3d 1285, 1287 (10th Cir. 2003) (same); *Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1311-12 (10th Cir. 2002) (same). However, the fact that the plaintiff ordinarily has this burden stems from the Supreme Court's holding in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), that "*government officials* performing discretionary functions *generally* are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. at 818 (emphasis added). Thus, *Harlow* created a rebuttable presumption that government officials are entitled to qualified immunity. *Medina v. Cram*, 252 F.3d 1124, 1129 (10th Cir. 2001).

By comparison, in *Wyatt v. Cole*, 504 U.S. 158 (1992), the Supreme Court explained that the reasons for recognizing qualified immunity for government officials in *Harlow* "were

based . . . on the special policy concerns involved in suing government officials" and that these concerns do not apply to private parties. *Id.* at 167. The Court explained:

> Although principles of equality and fairness may suggest . . . that private citizens who rely unsuspectingly on state laws they did not create and may have no reason to believe are invalid should have some protection from liability, as do their government counterparts, such interests are not sufficiently similar to the traditional purposes of qualified immunity to justify such an expansion.

Id. at 168. The Court concluded that "the nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of immunity." *Id.*

Based on this reasoning, this court is of the opinion that the rebuttable presumption of qualified immunity created in *Harlow* does not exist when the defendant is a private party. Thus, a private party defendant has the burden to establish that it is entitled to assert the qualified immunity defense. *See Koch v. Shell Oil Co.*, 52 F.3d 878, 880 (10th Cir. 1995) (on motion for summary judgment, defendant has the burden of proof on an affirmative defense). Therefore, in this case, Mr. Johnson has the burden to prove that he is entitled to assert the qualified immunity defense.

To determine whether a private individual may rely on a qualified immunity defense, the court must examine: (1) the historical availability of the defense to the group to which the individual belongs; and (2) policy considerations supporting the doctrine of qualified immunity. *Richardson*, 521 U.S. at 403-04. In *Richardson*, the Supreme Court determined that history and the policy considerations underlying qualified immunity did not support the

extension of qualified immunity to prison guards who were employed by a private, for-profit corporation that had contracted with the state to manage the prison. The Court first determined that, although historically prisons were run by both private and state actors, no "firmly rooted" tradition of immunity for privately employed prison guards existed. *Id.* at 404-06. Second, the Court discussed three purposes of qualified immunity: (1) protecting against unwarranted timidity on the part of government officials; (2) ensuring that talented candidates are not deterred from entering public service; and (3) preventing the distraction of governmental officials by lawsuits. *Id.* at 406-08. In analyzing these policy justifications, the Court was persuaded that unwarranted timidity was a problem that would be overcome by market forces as various firms vied to provide safe and efficient prison services. *Id.* at 408-11. Also, the Court reasoned that insurance can limit employees' liability exposure and employee indemnification agreements can limit the deterrent effect on qualified candidates. *Id.* at 410-11. The Court also noted that private firms were free to deal with over- or under-zealous employees in a way that the government cannot because of civil service restrictions. *Id.* at 410. With respect to the last of the three policy justifications, the court reasoned that the distraction of litigation alone was insufficient to justify qualified immunity. *Id.* at 411-12.

In this case, defendants do not even argue that a firmly rooted tradition of immunity exists for private individuals such as Mr. Johnson. Instead, defendants argue that the policy considerations at issue in this case differ from those in *Richardson*, and, therefore, Mr.

Johnson is entitled to qualified immunity. Accordingly, the court will focus its inquiry on examining these policy considerations.[7]

With respect to the first purpose of qualified immunity, *i.e.*, protecting against unwarranted timidity, the Court reasoned that a private prison management company like the defendant in *Richardson* is subject to ordinary marketplace pressures because it operates for a profit and can be replaced by another firm that can do a more effective job. *Id.* at 409. Consequently, private firms have a strong incentive to "avoid overly timid, insufficiently vigorous, unduly fearful, or 'non-arduous' employee job performance." *Id.* at 410. By comparison, CDDOs must be nonprofit corporations. *See* K.S.A. § 19-4007 (allowing

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[7] The Court in *Richardson* added a caveat to its holding:

> [W]e have answered the immunity question narrowly, in the context in which it arose. That context is one in which a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertakes that task for profit and potentially in competition with other firms. The case does not involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential government activity, or acting under close official supervision.

Id. at 413. Although defendants cite the first two sentences of this quote, they do not attempt to explain how this case falls outside of the realm of *Richardson*.

Defendants also point out that the Court in *Richardson* did not foreclose the possibility that private party defendants may be entitled to some type of good faith defense even if they are not entitled to qualified immunity. *Id.* at 413-14. However, again, defendants do not attempt to explain how any such good faith defense might apply in this case.

Because, as explained above, defendants have the burden of proof on these issues, the court has confined its analysis to defendants' sole argument, which is that public policy considerations warrant the extension of qualified immunity in this case.

counties to contract only with "nonprofit" corporations to provide community mental retardation services); K.S.A. § 39-1803(d) (defining CDDO as the community mental retardation facility). But of course non-profit organizations must also be concerned with their profit levels because insufficient financial resources can hinder and potentially even cripple an organization's ability to function. *See, e.g., Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 82 F. Supp. 2d 901, 906 (N.D. Ill. 2000) (recognizing that even non-profit corporations must attempt to maximize their profits). Also, a county must follow a lengthy and complicated process in order to change the entity designated as its CDDO, including obtaining approval from SRS. K.A.R. 30-64-12.

Thus, the policy considerations discussed by the Court in *Richardson* are admittedly somewhat tempered under the facts of this case. However, the entities that are designated as CDDOs, just like any other private party, can in fact be replaced, even if the CDDO replacement process is a bit more cumbersome than selecting a new vendor. Ultimately, Sunflower, like the prison in *Richardson*, is faced with the market threat of being replaced in its role as CDDO if it fails to carry out its duties adequately, and presumably the receipt of public funding associated with being designated as a CDDO is a sufficient market force to counteract the "unwarranted timidity" that might otherwise exist in the performance of CDDO functions.

Defendants have not addressed how the second *Richardson* public policy consideration—*i.e.*, ensuring that talented candidates are not deterred from entering public service by virtue of the threat of personal liability—applies in this case. Presumably

Sunflower is capable of purchasing insurance and indemnifying its employees. With respect to the last of the three policy justifications discussed in *Richardson*, the court reasoned that the distraction of litigation alone was insufficient to justify qualified immunity. 521 U.S. at 411-12.

In sum, because of the lack of evidence before the court regarding the historical availability of the qualified immunity defense to defendants like Mr. Johnson, and because defendants have not persuaded the court that public policy considerations warrant extending qualified immunity to defendants like Mr. Johnson, the court is of the opinion that defendants have not, at least based on the present state of the record, established that Mr. Johnson is entitled to assert this defense. Accordingly, defendants' motion for summary judgment on the basis of qualified immunity is denied.

V. Plaintiffs' Claims Against Sunflower

As with a governmental entity, a private entity such as Sunflower acting under color of state law "'cannot be held liable *solely* because it employs a tortfeasor–or, in other words . . . cannot be held liable under § 1983 on a *respondeat superior* theory.'" *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1216 (10th Cir. 2003) (emphasis in original; quoting *Monell v. Dep't of Soc. Servcs.*, 436 U.S. 658, 691 (1978)). Rather, liability only exists where the entity itself "causes the constitutional violation at issue." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Therefore, the violation must be caused by either: (1) an official policy or custom reflecting a deliberate or conscious choice by city policymakers, *id.* at 389; or (2) an official with final policymaking authority with respect to the conduct at issue, *Randle v. City or*

Aurora, 69 F.3d 441, 447 (10th Cir. 1995); *Houston v. Reich*, 932 F.2d 883, 887 (10th Cir. 1991).

In this case, defendants argue that Rosewood has failed to satisfy the first of these, *i.e.*, that Mr. Johnson did not act pursuant to a policy or custom adopted by Sunflower. Sunflower is only liable under this theory if it had an identifiable policy or custom that was the "direct cause" or "moving force" behind the constitutional violation. *Dubbs*, 336 F.3d at 1215 (citations omitted); *Myers v. Okla. County Bd. of County Comm'rs*, 151 F.3d 1313, 1316 (10th Cir. 1998). There is some evidence from which it could reasonably be inferred that Rosewood was generally disliked by at least one member of the Sunflower board, Mr. Cobb, and that the Sunflower board generally listened to Mr. Johnson criticize Rosewood. However, no evidence suggests that Sunflower's policies were the "moving force" behind Mr. Johnson's actions such as subjecting Rosewood to closer scrutiny than other service providers, attempting to involve SRS in his dealings with Rosewood, allegedly unjustifiably denying funding for Rosewood's clients, or slamming his fist down on a table and yelling at Ms. Hammond. Rosewood has failed to direct the court's attention to any facts that would suggest Sunflower had an identifiable policy or custom that was designed to eliminate competition from other providers or silence lobbying efforts regarding the independent, non-provider CDDO issue.

However, Rosewood argues that Sunflower is liable for the actions of Mr. Johnson by virtue of his position and responsibilities as Sunflower's executive director. Rosewood may establish that Sunflower should be held liable for Mr. Johnson's activities by showing that he

was "'responsible for establishing final policy with respect to the subject matter in question'" and that he made a "'deliberate choice to follow a course of action . . . from among various alternatives.'" *Dill v. City of Edmond*, 155 F.3d 1193, 1211 (10th Cir. 1998) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)). If so, liability can arise even though his decision was specific to a particular situation. *Id.* His status as a final policymaker turns on whether he had the authority to establish Sunflower's official policies "in a particular area, or on a particular issue." *Id.* (quotation omitted). In making this determination, the court must consider three things: (1) whether he is meaningfully constrained by policies made by a higher authority; (2) whether his decisions are final in the sense that they are not subject to any meaningful review; and (3) whether his policy decisions are within the realm of his authority. *Randle*, 69 F.3d at 448.

Here, there can be little question that Mr. Johnson's conduct was within his realm of authority. Sunflower's bylaws designate the "director" (presumably, Mr. Johnson, the executive director) as the chief executive officer of the board of directors and charges him with a wide variety of responsibilities. These include, among other things, administering Sunflower's affairs as directed by the board of directors, cooperating with staff "and all those concerned" with rendering professional services to clients, and performing other such duties that may be necessary in Sunflower's best interests. As Mr. Johnson testified in his deposition, he is responsible for carrying out Sunflower's responsibilities as CDDO. Quite simply, he runs Sunflower. Further, there is no suggestion based on the present state of the record that Mr. Johnson's relevant conduct was meaningfully constrained by policies enacted

by the board of directors or that the board ever subjected Mr. Johnson's conduct to any type of meaningful review. Thus, the court is persuaded that plaintiff has raised a genuine issue of material fact regarding whether Mr. Johnson acted with the requisite final policymaking authority sufficient to hold Sunflower liable for his actions.[8] *See, e.g., Malak v. Associated Physicians, Inc.*, 784 F.2d 277, 283 (7th Cir. 1986) (holding a genuine issue of material fact existed regarding whether a hospital's chief executive officer was a final policymaker for purposes of § 1983 liability); *Rookard v. Health & Hosps. Corp.*, 710 F.2d 41, 45 (2d Cir. 1983) (holding a public hospital's executive director was a final policymaker for purposes of § 1983 liability). Accordingly, defendants' motion for summary judgment on this basis is denied.

VI. Plaintiffs' Claims Based on Mr. Johnson's Thirteen-Page Enforcement Action

The court must apply state contract law to issues involving the formation, construction, and enforcement of a settlement agreement. *United States v. McCall*, 235 F.3d 1211, 1215 (10th Cir. 2000). Where, as here, the construction of a written contract is at issue, it is a matter of law for the court. *Wagnon v. Slawson Exploration Co.*, 255 Kan. 500, 511, 874 P.2d 659, 666 (1994). The "cardinal rule of contract interpretation is that the court must ascertain the parties' intention and give effect to that intention when legal principles so allow."

[8] It is unclear whether Rosewood is basing its claims in part on the actions of Mr. Cobb or Mr. Cross. However, the court observes that Rosewood has not made any showing that either Mr. Cobb or Mr. Cross acted pursuant to a policy or custom adopted by Sunflower or that either of them acted with final policymaking authority on behalf of Sunflower with respect to any of their activities listed in the statement of material facts above. Further, neither of them are parties to this lawsuit.

Ryco Packaging Corp. v. Chapelle Int'l, Ltd., 23 Kan. App. 2d 30, 36, 926 P.2d 669, 674 (1996) (citing *Hollenbeck v. Household Bank*, 250 Kan. 747, 751, 829 P.2d 903, 906 (1992)). Where a contract is complete and unambiguous on its face, the court must determine the parties' intent from the four corners of the document, without regard to extrinsic or parol evidence. *Simon v. Nat'l Farmers Org., Inc.*, 250 Kan. 676, 679-80, 829 P.2d 884, 887-88 (1992).

As an element of contract construction, whether an instrument is ambiguous is a question of law for the court. *Id.* at 680, 829 P.2d at 888. A contract is ambiguous if it contains "provisions or language of doubtful or conflicting meaning, as gleaned from a natural and reasonable interpretation of its language." *Id*. Contractual ambiguity appears only when "the application of pertinent rules of interpretation to the fact of the instrument leaves it generally uncertain which one of two or more possible meanings is the proper meaning." *Marquis v. State Farm Fire & Cas. Co.*, 265 Kan. 317, 324, 961 P.2d 1213, 1219 (1998). The court must not consider the disputed provision in isolation, but must instead construe the term in light of the contract as a whole, such that if construction of the contract in its entirety removes any perceived ambiguity, no ambiguity exists. *Arnold v. S.J.L. of Kan. Corp.*, 249 Kan. 746, 749, 822 P.2d 64, 67 (1991).

The mediation agreement, when construed as a whole, is unambiguous. It states that, with respect to Sunflower's thirteen-page enforcement action against Rosewood and Rosewood's subsequent rebuttal document on June 23, 2000, "the parties agree to withdraw both documents." In the latter part of that same sentence, they agreed to continue to mediate

their "concerns and issues" with the DD Reform Act, CDDO policies and procedures, and contractual relationships. The parties stated that these documents were "impeding progress in addressing underlying concerns and disagreements between the parties." Then, in the second paragraph, Sunflower agreed not to use any of the allegations in the enforcement action "to impede Rosewood's provider license, its affiliation relationship with Sunflower, or Rosewood's right to do business in Sunflower's service area," and similarly recommended that no one else use the enforcement action for those purposes. In the third paragraph, Mr. Johnson apologized for the manner in which he delivered the letter.

Construing all of these provisions together and, consequently, the mediation agreement in its entirety, it is evident that the parties' principal purpose in entering into the agreement was to temporarily diffuse the tensions between them so that they could hopefully work toward building an amicable working relationship. *See, e.g.*, Restatement (Second) of Contracts § 202 (1981) ("[I]f the principal purpose of the parties is ascertainable it is given great weight."). By withdrawing the thirteen-page enforcement action, Sunflower agreed not to use it, for example, as the basis for an enforcement action against Rosewood, to rescind Rosewood's affiliation agreement, to deny Rosewood funding for its clients, or to encourage SRS to scrutinize Rosewood's provider license. Thus, the parties sought to at least postpone further formal actions by either party based on the *substance* of the allegations while they worked toward a more permanent resolution of their disputes.

However, despite the fact that the agreement purports to at least temporarily resolve the parties' disputes, it notably fails to contain any language from which it can be inferred that

the parties intended to forego litigation indefinitely if they reached an impasse after attempting in good faith to resolve their mutual concerns and issues. Perhaps most importantly, nothing in the agreement purports to relieve Sunflower of liability for the fact that Mr. Johnson prepared and delivered the allegations against Rosewood in the first place. The agreement contains an apology from Mr. Johnson for the manner in which he delivered the letter, but the court is unaware of any legal authority that would support the proposition that an apology relieves a party from liability for the underlying conduct. Therefore, the court is unpersuaded that the mediation agreement bars plaintiffs' claims based on the thirteen-page enforcement action. Accordingly, defendants' motion for summary judgment on this basis is denied.

PLAINTIFFS' MOTION TO EXCLUDE PORTION OF EXPERT TESTIMONY

Lastly, the court will briefly address plaintiffs' motion to exclude portion of expert testimony (Doc. 83). In the motion, plaintiffs move the court for an order excluding "that portion of the expert witness opinion of David W. Powell . . . that defendant Jim Johnson's purpose for authorizing certain documents was for a legitimate purpose rather than to harass plaintiffs, treat plaintiffs differently than other similarly situated community service providers, or as part of defendants' efforts to retaliate against plaintiffs for the exercise of their First Amendment rights." In defendants' response, they concede that Mr. Johnson's intent in authoring the documents is not a proper subject of expert testimony (Doc. 86, at 4). Defendants' response also argues that all of the other portions of Mr. Powell's anticipated testimony are admissible. In plaintiffs' reply, plaintiffs clarify that it is only testimony regarding Mr. Johnson's intent in authoring these documents (*i.e.*, whether he authored them

for a legitimate purpose) that they seek to exclude. Therefore, plaintiffs' motion to exclude is granted because it is, as a practical matter, unopposed. Accordingly, Mr. Powell shall not be permitted to offer opinion testimony regarding Mr. Johnson's purpose in authoring the four documents.

IT IS THEREFORE ORDERED BY THE COURT that defendants' motion for summary judgment (Doc. 82) is granted in part and denied in part as set forth above.

IT IS FURTHER ORDERED BY THE COURT that plaintiff Tammy Hammond is hereby dismissed from this lawsuit.

IT IS FURTHER ORDERED BY THE COURT THAT defendants' motion to exclude portion of expert testimony (Doc. 83) is granted.

IT IS SO ORDERED this 8th day of September, 2003.

s/ John W. Lungstrum
John W. Lungstrum
United States District Judge